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1-1004-836-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF COMMERCE

In the Matter of the Insurance Agent's License of Bruce E. Larson.	FINDINGS Of. FACT, CONCLUSIONS AND RECOMMENDATION

The above-entitled matter came on for hearing before Administrative Law Judge George A. Beck on September 23, 1986 at 9:00 A.M. in the Library of the Department of Commerce, 500 Metro Square Building, Seventh and Robert Streets, in the City of St. Paul, Minnesota.

John C. Bjork, Special Assistant Attorney General, 1100 Bremer Tower, Seventh Place and Minnesota Street, St Paul , Minnesota 551 01 , appeared on behalf of the Department of Commerce. Joseph W. Anthony, Esq., of the firm of Fruth and Anthony, P.A. , 1350 International Centre, 800 Second Avenue South, Minneapolis, Minnesota 55402, appeared on behalf of the Licensee, Bruce E. Larson. The record closed on October 30, 1986, the date of receipt of the final written memorandum submitted by a party.

This Report is a recommendation, not a final decision. The Commissioner of Commerce will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Michael A. Hatch, Commissioner, Minnesota Department of Commerce, 500 Metro Square Building, Seventh and Robert Streets, St. Paul, Minnesota 55101 to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether or not the Respondent (1) used fraudulent, coercive or dishonest practices, (2) was incompetent, untrustworthy or financially irresponsible,

(3) did not have reasonable grounds for believing that his recommendation was suitable, or (4) failed to make a timely refund upon request, in the course of his activities as an insurance agent in the sale of a policy to Virginia A. Sharpe.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Respondent, Bruce E. Larson has been a licensed insurance agent for approximately 10 years. Mr. Larson has been employed by National

Independent Brokers, Inc., a Minneapolis firm, for the entire 10-year period. During that time he has sold approximately 2,000 Medicare supplement insurance policies.

2. Sometime prior to February 11, 1986 Mr. Larson telephoned Virginia L. Sharpe, age 71, and told her that he had a Medicare supplement policy that he thought she might be interested in. He asked if he could visit her and she agreed to Mr. Larson visiting her at her south Minneapolis apartment on February 11, 1986. Mr. Larson.had Mrs. Sharpe's name because he had previously sold her a Medicare supplement policy in 1980. (Ex. D).

3. Mrs. Sharpe had just recently moved to Minneapolis. She had resided in St. Paul before her move where she knew a Group Health, Inc. manager who suggested that she join Group Health when she moved to Minneapolis. She did apply to Group Health, Inc. upon moving to Minneapolis but her coverage was not to be effective immediately because she was still covered by St Paul-Ramsey Hospital coverage under which she had had a cataract operation just prior to her move to Minneapolis. At the time of Mr. Larson's visit, Mrs. Sharpe was scheduled to attend an orientation session at Group health on February 18, 1986.

4. When Mr. Larson arrived at Mrs. Sharpe's apartment on February 11, 1986 he was accompanied by Curtis Himmerick, who had just joined National Independent Brokers and was field training with Mr. Larson. They all sat at a table in the kitchen where Mr. Larson spread out several documents including an application. Mrs. Sharpe had had cataract surgery shortly before the meeting on February 11, 1986 was not able to clearly see or read the documents presented by Mr. Larson. Mr. Larson proceeded to explain the Medicare deductibles, the need for a Medicare supplement policy, the benefits the policy provided and the amount of the premium.

5. Mr. Larson explained that the policy had nursing home coverage and that extended coverage was important for rehabilitation purposes. Mrs. Sharpe advised Mr. Larson that she was not interested in nursing home coverage because she hoped not to live long enough to have to go to a nursing home.

6. Mrs. Sharpe signed an application for a Medicare supplement policy filled out by Mr. Larson which listed an annual premium of $488.20, as well as

a rider for skilled nursing home care at an annual premium of $63.45. Mrs. Sharpe also signed an acknowledgment that she understood the policy, had a need for the coverage and could afford the cost of the coverage. (Ex. A). Mr. Larson left a "Guide to Health Insurance for People with Medicare" with Mrs. Sharpe. Mr. Larson also provided Mrs. Sharpe with a written summary of the benefits of the Medicare supplement policy which was amended in handwriting to show extra benefits for skilled nursing care. (Ex. 1).

7. Mrs. Sharpe gave Mr. Larson a check payable to Medical (sic) Life Insurance Company in the amount of $120.40 as the total first premium. (Ex. 2). Mr. Larson's commission on the first premium was $41.12. (Ex. 6). There was also a $20 fee contained in the payment which Mrs. Sharpe believed was not refundable.

8. Mrs. Sharpe did not tell Mr. Larson that she had applied to Group Health but did mention that she would shortly be going to a Group Health orientation meeting. Mrs. Sharpe was aware that she had 30 days to cancel the

policy she applied for with Mr. Larson. She intended to check her coverage at the Group Health orientation meeting and then get back to Mr. Larson. The meeting at Mrs. Sharpe's apartment lasted approximately 45 minutes.

9. Mr. Larson proceeded to turn in Mrs. Sharpe's check and application to National Independent Brokers on February 13, 1986 along with other business he had written on February 11, 1986 and February 13, 1986. (Ex. 6, Ex. E).

10. On February 18, 1986 Mrs. Sharpe attended the Group Health orientation session. She was advised by a Group Health patient representative to cancel the policy she had applied for with Mr. Larson since she had all the coverage she needed with Group Health.

11. Mrs. Sharpe called Bruce Larson on February 19, 1986 at 8:40 A.M., however, he was not in at the time. She left a message that she wanted to cancel the policy. (Ex. 7).

12. Mrs. Sharpe also wrote a letter dated February 19, 1986 to Mr. Larson asking him to cancel the policy she purchased on February 11 and requesting the return of her premium. (Ex. 3). She asked her nephew to mail the original of the letter. The letter was addressed to Mr. Larson at the offices of his employer, National Independent Brokers, Inc. at 6524 Walker Street, in Minneapolis. The letter was never received by National Independent Brokers, Inc., however.

13. Whenever a refund request is received at the offices of National Independent Brokers the relevant file is pulled and two copies of the request are made. The original of the request goes to the agent so that he can respond within five days. One copy is given to a state manager and one remains with the file. Whenever the office receives a telephone request for cancellation of a policy, it asks the applicant to put that request in writing.

14. Mr. Larson returned Mrs. Sharpe's telephone call on February 20, 1986 and she told him that she wanted to cancel the medical policy because she was covered by Group Health. Mrs. Sharpe also requested a refund of her premium. Mr. Larson was abrupt during the conversation and was not pleased that the policy was being cancelled.

15. On March 2, 1986 Mrs. Sharpe wrote a letter directly to Medico Insurance Company stating that she had called Mr. Larson and also sent him a letter asking that her policy be cancelled but had not yet received a refund of the premium as she had requested. The letter was received by Medico Life Insurance Company on March 5, 1986. (Ex. 4).

16. Mrs. Sharpe also called the Minnesota Department of Commerce on March 5, 1986 to complain about the failure to refund her premium. She followed this up with a written complaint in a letter dated March 5, 1986 which was received by the Department on March 7, 1986. (Ex. 5). A copy of the March 5, 1986 letter was then sent to Mr. Larson and received by him on approximately March 14, 1986. Mrs. Sharpe first learned that she had purchased a "rider" from Department personnel.

17. Mrs. Sharpe's insurance policy was received at the office of National Independent Brokers on March 7, 1986. On March 10, 1986 Mr. Larson mailed the policy to Mrs. Sharpe. (Ex. C, Ex. 8). When Mrs. Sharpe received the policy

she mailed it back to Medico Insurance Company and called the company long distance to ask for a refund of her premium.

18. On March 12, 1986 National Independent Brokers received a copy of Mrs. Sharpe's March 2, 1986 letter to Medico Life Insurance Company from Medico Life Insurance Company. National Independent Brokers then advised Mr. Larson that he had five days to handle the matter or the refund would automatically be sent to Mrs. Sharpe. (Ex. 9).

19. On March 14, 1986 a refund check in the amount of $120.40 was mailed to Mrs. Sharpe from National Independent Brokers. (Ex. B).

20. On August 13, 1986 the Commissioner of Commerce issued a Notice of and Order for Hearing in this matter setting a hearing date of September 23, 1986.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. That the Commissioner of Commerce and the Administrative Law Judge have jurisdiction in this matter pursuant to Minn. Stat. 60A.17, subd. 6c and 14.50.

2. That the Department of Commerce has fulfilled all relevant substantive and procedural requirements of law or rule.

3. That the Department of Commerce has given proper notice of the hearing in this matter.

4. That pursuant to Minn. Stat. 60A.17, subd. 6c(a)(9), the Commissioner of Commerce may suspend or revoke an insurance agent's license or impose a civil penalty not to exceed $5,000 if the licensee has used fraudulent, coercive or dishonest practices or has been shown to be incompetent, untrustworthy or financially irresponsible.

5. A licensee may also be disciplined for a violation of any rule adopted by the Commissioner pursuant to Minn. Stat. 60A.17, subd. 6c(a)(3).

6. Minn. Rule 2795.0900 provides that in recommending a purchase of a Medicare supplement policy to a customer:

> an agent must have reasonable grounds for believing that the recommendation is suitable for the customer, and must make reasonable inquiries to determine suitability. The suitability of a recommended purchase of insurance will be determined by reference to the totality of the particular customer circumstances, including, but not limited to, the customer's income, the customer's need for insurance, and the values, benefits, and the costs of the customer's

existing insurance program, if any, when compared to the values, benefits, and costs of the recommended policy or policies.

7. Minn. Rule 2795.1700, dealing with refunds, provides as follows:

> An agent who receives a request for cancellation of a policy must make the refund or initiate refund procedures with the insurer, within ten days of the agent's receipt of the request. An agent who receives a refund from an insurer for the account of, or for delivery to, an insured or former insured, must deliver or mail the refund, or cause it to be delivered or mailed to the insured or former insured within five days of receipt.

8. That the Department of Commerce has proved by a preponderance of the evidence that Mr. Larson violated Minn. Rule 2795.1700, the refund rule, and therefore also violated Minn. Stat. 60A.17, subd. 6c(a)(3).

9. That the Licensee's conduct relating to the refund is also untrustworthy contrary to Minn. Stat. 60A.17, subd. 6c(a)(9).

10. That the Department has failed to prove by a preponderance of the evidence any other violations alleged.

11. That the above Conclusions are arrived at for the reasons set out in the memorandum which follows and which is incorporated into these Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Commerce take disciplinary action against the insurance agent's license of Bruce E. Larson.

Dated: November 25 1986.

GEORGE A. BECK
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape Nos. 4916, 4917.

MEMORANDUM

In this case the Department of Commerce has the burden of proof to prove the facts at issue by a preponderance of the evidence. Minn. Rules 1440.7300 subp. 5 (1985). In re Schulz, 375 N.W.2d 509, 513-14 (Minn. App. 1985). Even where fraud is alleged in a licensing case, the appropriate standard of proof has been held to be preponderance of the evidence. Steadman v. SEC, 450 U.S.91, rehrg.den. 451 U.S.933 (1981). A preponderance of the evidence is sometimes said to be evidence Which is of greater weight or more convincing than the evidence which is offered in opposition to it or evidence which as a whole shows that the fact sought to be proved is more probable then not. Black's Law Dictionary, (5th Ed. 1979). This standard of proof requires a determination as to which version of the facts advanced is more likely than not to be accurate.

An additional consideration in this case is whether or not the Department must prove scienter or intent on the part of a licensee when it alleges he engaged in fraudulent, coercive or dishonest practices. (Respondent's Brief, p. 14). There does not appear to be any Minnesota case law interpreting Chapter 60A on this point. Relevant to that question are SEC actions involving an allegation of fraud. The rule has been that a private cause of action for damages alleging fraud under 10b. of the Securities Exchange Act of 1934 required proof of scienter. Ernst and Ernst v. Hochfelder, 425 U.S.185 (1976). The rule had been, however, that in enforcement proceedings brought by the SEC, specific intent to defraud was irrelevant. Hanly v. SEC, 415 F.2d 589 (2nd Cir. 1969). However, in Aaron v. SEC, 446 U.S.682 (1980), the court held that the SEC must establish scienter as an element of a civil enforcement action to enjoin violations of 17a. of the 1933 Act and 10b. of 1934 Act. These sections speak about "fraud or deceit" and using a "manipulative or deceptive device". The court observed that the rationale of Hochfelder led to the conclusion that scienter is an element of a violation of 10b. and Rule lOb-5 regardless of the identity of the plaintiff or the nature of the relief sought.

The dictionary meaning of fraud is "a deception deliberately practiced in order to secure unfair or unlawful gain." American Heritage Dictionary (2nd Coll. Ed. 1982). Black's Law Dictionary (5th Ed. 1979) contains several definitions but includes words such as "intentional". intended to deceive", and "willful". It is concluded therefore that it is appropriate to interpret the phrase "fradulent, coercive or dishonest" to require the Department to prove intent on the part of a licensee.

An important factor in a case such as this, where some factual allegations are in direct conflict, is the credibility of the witnesses. An examination of the record demonstrates some reason to question the credibility of both Mr. Larson and Mr. Himmerick on the one side and Mrs. Sharpe, the Department's main witnesss, on the other. Mr. Larson obviously has a good deal at stake at this proceeding. Additionally, he testified with certainty that he had made only one sale on February 11, 1986. However, he and Mr. Himmerick clearly made one other sale on that day. (Ex. 11). Mr. Himmerick, who accompanied Mr. Larson on the February 11 sales call, also testified it was the only sale that day. He had earlier told a Department investigator however, that they had made several calls that day. Mr. Larson is Mr. Himmerick's branch

manager. Mrs. Sharpe's credibility was somewhat impaired by her testimony that she wrote both Exhibit 4 and Exhibit 5. They are obviously in different handwriting and it would appear that Exhibit 5 was written for Mrs. Sharpe by someone else and that she signed it. Mrs. Sharpe- appeared to be uncertain about some of the details of Mr. Larson's visit and her subsequent actions. Because of these factors, it is important to examine the documentary evidence carefully, as well as the actions that were taken by the parties concerned, in determining whether it is more likely than not that certain events occurred.

Mrs. Sharpe testified that Mr. Larson told her that the policy he was selling had nursing home coverage. She also testified that she told him that she was not interested in nursing home coverage since she was hoping not to live long enough to need it. The actual benefits provided under the policy are not for long-term nursing home care but rather for skilled nursing care for the purpose of rehabilitation. The basic Medicare supplement policy provided skilled nursing coverage after the 100th day. The rider which Mr. Larson sold Mrs. Sharpe provided coverage for days 21 through 100. The Department argues that selling Mrs. Sharpe this rider violated the rule on suitability. That rule requires an insurance agent to examine the totality of a particular customer's circumstances including the need for insurance and the customer's existing insurance program. However, in this case Mrs. Sharpe admittedly did not advise Mr. Larson of her application to membership with Group Health but merely indicated she would be attending an orientation program in the future. Accordingly, the Department has not shown that Mr. Larson did not have reasonable grounds to recommend the policy he sold to Mrs. Sharpe. As far as he knew, she had a need for this insurance.

The Department also suggests that the sale of the rider to Mrs. Sharpe was both fraudulent, coercive or dishonest and incompetent, untrustworthy or financially irresponsible. These allegations have not been proved. The documents left with Mrs. Sharpe indicate that the coverage being applied for was both an adult care policy as well as a rider providing extended nursing home care benefits. The premiums are separately stated in the application. Although Mrs. Sharpe may have expressed her feelings about residing in a

nursing home, it seems more likely than not that she agreed to the skilled nursing care rider whether or not she remembered the term "rider". It has not been shown that the Licensee was dishonest in the sense that he added this rider to the policy despite the Applicant's specific request not to do so. Furthermore, the evidence does not show that the Licensee intentionally committed a fraudulent act in this regard. While Mrs. Sharpe did not learn that there was a "rider" on the policy until she talked to the Department of Commerce, she likely was advised of the extended skilled nursing care benefit to be added to the policy on February 11.

Mrs. Sharpe also testified that she was hesitant to write a check for the initial premium since she was on a fixed income. She stated that Mr. Larson said he would hold the check for her and she asked him not to cash it until she called. Mr. Larson did in fact turn the check in with other business on February 13. It is concluded, however, that it is more likely than not that Mrs. Sharpe did not actually make this request of Mr. Larson. Given the contradictory testimony on this point, the actions of the parties must be examined. Mrs. Sharpe did not post-date the check so as to prevent Mr. Larson from cashing it. Nor did she apparently specify any specific date on which he could cash the check. Additionally, there is no reference in her subsequent letters on the matter to Mr. Larson's failure to refrain from cashing the

check as she requested. The check apparently passed through her account without a problem. Finally, it does not appear that Mrs. Sharpe, when she called Mr. Larson to cancel the application, asked him to return her uncashed check. Her testimony would lead one to assume that at this point she would still would have expected Mr. Larson to be holding the check. Her request to Mr. Larson was to obtain a refund which assumes that the check had been cashed. As Mr. Larson testified, if he turned in a check which was likely to be returned marked non-sufficient funds he was simply creating more work for himself since he would have to.return to the applicant to obtain another premium check. Considering all of the testimony and actions of the parties, it is concluded that the Department has not proved by a preponderance of the evidence that Mrs. Sharpe told Mr. Larson to delay cashing her premium check.

The last allegation by the Department concerns the refund request made by Mrs. Sharpe. The record seems clear that she called Mr. Larson on February 19 to specifically tell him she wanted to cancel the policy and obtain a refund. Mr. Larson apparently called her back on the 20th of February to discuss the matter. The testimony differs as to the content of this conversation. Mr. Larson testified that she agreed to wait until the policy arrived so that she could compare it with her Group Health coverage and then obtain a refund at that time if she still wanted one. Mrs. Sharpe testified that the conversation was very short, that Mr. Larson was abrupt and apparently disappointed in her cancellation. She says she demanded a refund. The subsequent events enhance the credibility of Mrs. Sharpe's testimony. On March 2, 1986 she wrote a letter to Medico Insurance Company in which she stated that her request for a refund was ignored by Mr. Larson. It seems unlikely that this letter would have been written in the manner it was if she had agreed to wait until the policy arrived for a refund. Also supporting Mrs. Sharpe's version of the events is the fact that the phone message she left was unequivocal, stating that she wanted to cancel, rather than simply Mr. Larson to call her to discuss her coverage. It also seems unlikely that

Mrs. Sharpe would have carried her complaint to the Department unless she had specifizally requested a refund which was not forthcoming.

The rule in question provides that an agent who receives a request for cancellation must make the refund or initiate the procedures to do so with the insurer within 10 days of receipt of the request from the applicant. Mr. Larson argues that the first written notice he had of the refund request was the copy of her March 2 letter to Medico which he apparently received on or about March 12, 1986. (Ex. 9). The refund was actually made on March 14, 1986. The rule however does not require a refund request to be made in writing. In this case the oral refund request is documented by a telephone slip kept by National Independent Brokers. It is admitted that Mrs. Sharpe and Mr. Larson spoke within a day or two of this February 19 telephone call. Mr. Larson was obligated to make a refund within 10 days of his receipt of the request for cancellation. This occurred either on February 19 or a day thereafter. Accordingly, a refund on March 14, 1986 would not be timely under the rule.

The Department also alleges that this conduct by the Licensee constitutes fraudulent, coercive or dishonest practices and demonstrates his incompetency, untrustworthiness or financial irresponsibility. It is concluded that the evidence does not show that the Licensee intentionally attempted to defraud Mrs. Sharpe by not making a refund. It appears, that although he received a request for a refund, he determined for whatever reason to wait until the

policy arrived, perhaps in hope of changing her mind at that point. He did, however, when finally faced with the written request from Mrs. Sharpe, see that the refund was made. Such conduct can however properly be concluded to be untrustworthy in the language of the statute, since Mr. Larson failed to properly handle the matter. A showing of incompetency or untrustworthiness does not imply a showing of intentional conduct. Mere negligence is enough.

G.A.B.